ADMINISTRATIVE REVIEW AND THE "NORMATIVE" GOAL—IS ANYBODY OUT THERE?

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INTRODUCTION

It is often claimed that, in addition to arriving at the "correct or preferable"[1] decision in the individual case, a primary objective of an administrative review system is to have a "normative" influence on government decision-making. As the Federal government has made a commitment to the overhaul of the administrative review system,[2] it is timely to question the significant normative achievements which have been claimed over the past two decades of codified administrative review rights in Australia.

The first part of this article outlines the theoretical and practical foundations of the normative goal and the changing influences upon it. It attempts to unpack the concept and consider some of its claims. Is it, for example, realistic in the context of the dynamics of government administration, to continue to claim the "normative effect" as a goal of administrative review? Is the administration responsive to review? Is there evidence of administrative law "values" in the culture and processes of the administration? How can we evaluate the achievement of the normative goal? What has been the normative effect of the development of specialist tribunals? Have they improved the level of acceptance of administrative review within agencies whose decisions they review? How will proposals to establish the Administrative Review Tribunal (the ART) address the normative goal? In considering these questions it is necessary to consider the dominant influences upon the review system.

Changes in public administration and the extent of the divergence of the system from the original vision of the Kerr and Bland Committees[3] have been significant.

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1 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589.

2 Substantially, although it is not yet clear how closely the overhaul will be in line with the recommendations of the Administrative Review Council. See Administrative Review Council, *Better Decisions: Review of the Commonwealth Merits Review Tribunals* (ARC 39, 1995).

3 *Commonwealth Administrative Review Committee Report 1971* (Kerr Committee Report, Parliamentary Paper No 144 of 1971); *Interim Report of the Committee on Administrative Discretions* (Bland Committee Interim Report, Parliamentary Paper No 53 of 1973); *Final Report of the Committee on Administrative Discretions* (Bland Committee Report,

Considering that the "new" administrative law regime has been in effect for over twenty years, there has been little reported impact on agency culture.[4] Agencies are also increasingly taking the view that review tribunal decisions hold no precedent value, thus not binding the agency to treat like cases in the way they would be treated on review and causing potential injustice between those citizens with the resources to access review and those without.[5] Each decision that is overturned is effectively treated in isolation, thereby defeating even a limited normative role for review.

There has been a significant absence of evaluation of the effectiveness of review in terms of its normative aims; yet it remains important that these issues be considered in an empirical context.[6] The second part of this article considers two case studies from the migration jurisdiction, specifically, from the experience of merits review of decisions under the Migration Act 1958 (Cth).[7] They are illustrative of some of the conceptual and practical difficulties attendant upon embracing the normative goal and it is likely that they have a resonance across the Federal system of administrative review.[8]

This article argues for the continuing value of the normative goal for administrative review. The third section considers how the experience of the review system might be used more actively to steer a course towards achievement of this goal. Central to this is the way in which review tribunals see their task and the ongoing relationship between these review bodies and primary decision-makers. It is important to continue to question what the review process and the review decision offer that is any better than what went before. Whose interests does review serve and at what cost? Where review is seen to ignore the values of the administration and, likewise, the administration see no value in review, then a decision will always be isolated and the normative goal will be illusory.

Parliamentary Paper No 316 of 1973. See the compilation by R Creyke and J McMillan, *The Making of Commonwealth Administrative Law; Kerr, Bland and Ellicott Committee Reports* (1996).

4 There are few reported examples of ways in which the administration has responded to administrative review or of how it has resulted in changes to agency policy or procedure.

5 S Skehill in "The Impact of the AAT on Commonwealth Administration", paper presented to National AIAL Conference, *The AAT—Twenty Years Forward* (1-2 July 1996). The collected papers of this conference are reproduced in J McMillan (ed), *The AAT Twenty Years Forward: Passing a Milestone in Commonwealth Administrative Review* (1997).

6 There have been some academic research projects which are attempting to address this issue but they are, at the time of writing, yet to report. See for example J Goldring et al, "Evaluating Administrative Tribunals" in S Argument (ed), *Administrative Law and Public Administration: Happily Married or Living Apart under the Same Roof?* (1993) *AIAL Forum* 160 and work underway by the Judicial Review Project by D Pearce, R Creyke and J McMillan as a result of two large Australian Research Council grants.

7 On 1 June 1999 the Migration Legislation Amendment Act (No1) 1998 (Cth) came into effect and the Migration Review Tribunal assumed the jurisdiction formerly exercised by the Migration Internal Review Office and the Immigration Review Tribunal. The significance of the changes to the review system for migration decisions is not the focus of this paper but is canvassed by the writer in "Review of Migration Decision Making; Rival Goals and Values" (1999) 10 *PLR* 131.

8 In other tribunals, for example the Social Security Appeals Tribunal and the Administrative Appeals Tribunal.

THE NORMATIVE GOAL

Administrative review provides a means of checking the exercise of administrative power for an individual aggrieved by an adverse government decision. However, administrative review has a greater ambition in its claim of a normative effect on government administration. The "normative" goal of administrative review has three elements. Each element extends a little further into the corpus of government administration and the process of public policy making. The first—that similar cases should be treated in a similar way—is fundamental to the question of fairness and consistency in the treatment of individuals by government.[9] The second element is about improvement in the quality and consistency of decision-making, beyond the individual case, to the whole of the agency[10] whose decision has been reviewed. It promotes review as a model of fair and open decision-making. This encompasses not only issues of procedural fairness but the allocation of resources and the organisation and management of individual public agencies. The third element of the normative goal is the systemic improvement of the administration across government by the gradual adoption of values seen as inherent in administrative review.[11] This third element thus extends beyond the agency with decision-making responsibility to the character and culture of government agencies and to issues of public policy. The normative goal thus stretches from the instant case to the agency, and further to the public sector at large.

In the more than twenty years of the operation of the "new" administrative review system it can be seen that the legitimacy of all the elements of this normative creature remains in dispute. Agencies often view decisions of review tribunals as without precedent value and assume no obligation to apply their findings and reasoning to like cases.[12] Many review tribunals, particularly in high volume jurisdictions, are seen as providing "Rolls Royce" review incapable of application in the primary agency, either in terms of procedural fairness, policy choices, cost or consistency. The role of review tribunals in the development of government policy continues to be a contentious issue.

There is little consensus between the administration and review bodies on the values underlying review.[13] In the most general terms it is commonly accepted that in Federal merits review tribunals these "values"[14] encompass, at least, a review system which promotes lawfulness, fairness, openness, participation and rationality.[15] "Lawfulness" is, of course, the first and most basic aim of review. The decision must be

9 Administrative Review Council, above n 2 at para 2.11.

10 The term "agency" refers to the primary decision making body whose decisions are subject to merits and judicial review.

11 The Hon Justice Brennan, "Comment: The Anatomy of an Administrative Decision" (1980) 9 *Syd LR* 1.

12 Unlike, of course, judicial review.

13 This is not to say that there may not be consensus on other issues such as broad administrative accountabilities and management practices. See, for example, Management Advisory Board, *Accountability in the Commonwealth Public Sector* (1993).

14 The concept of "values" is used generally here although it is important to question whether these commonly-used terms are more descriptive of process than analytical of underlying issues. See P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990).

15 Administrative Review Council, above n 2.

lawful and within the power of the decision-maker. It must also be "fair" and encompass principles of procedural justice.[16] Reasons should be made public and hearings should be open with access to the information upon which a decision is based. "Participation" is broader value than the procedural fairness concept of a right to a hearing and in its breadth elicits greater controversy. It can, in practical terms, encompass giving the person affected by the decision the *real* opportunity to present their case, not disadvantaged by, for example, lack of legal advice, inadequate resources or an inability to pursue their case because of cultural or social disadvantage. The provision of rights to individuals to challenge government decision-making also has broader significance as an exercise in participatory democracy.[17] "Rationality" encompasses the application of rational legal principles and decisions based on relevant considerations that are well reasoned and display a measure of consistency and predictability.

Administrative processes will also commonly involve choices beyond legal requirements and may also involve political questions. This is particularly the case where the application of public policy is involved. An administrative decision thus takes place in a context that is not fully explained by resort to traditional legal theory. The manner of the exercise of executive power by ministers, the extent of discretionary power vested in the minister and political and practical constraints all contribute to the administrative decision-making context. The normative goal is as much about identifying the "values" involved in this complex paradigm as it is about effecting the "process". From these values will emerge different views on "rights" and, in particular, on the requirements of procedural justice which will be embodied in the decision-making and internal review processes which are adopted.

There are a number of tensions inherent in our administrative review system which impact upon achievement of the normative goal. There are often diverse and conflicting private and public interests at stake. There is a large and diverse membership of administrative review tribunals. It is unlikely that consensus could ever be achieved, either between or within court, tribunal and government decision-makers, on what the underlying values are and the priorities which they should be given. At the same time, the ideal of consistency is central to the normative goal of administrative review. While it must be recognised that the potential for disagreement among such a large and diverse group of decision-makers is great (as it is amongst the judiciary), agencies have arguably become increasingly cynical about the value of administrative review where decisions provide no, or contradictory, guidance on the correctness of departmental policies and practices while, at the same time, inconsistently overturning or affirming primary decisions in like cases. This cynicism may feed a bureaucratic culture of resistance to the ambit of administrative review and result in a dismissiveness of its value for improvement of the administration. Poor and inconsistent decision-making by review tribunals attacks the core of the normative goal in that it goes beyond potential injustice in the determination of the individual case and shapes values and processes within the administration in direct opposition to those of review.[18] Inconsistent decisions are clearly incapable of application in like

16 *Kioa v West* (1985) 159 CLR 550.

17 P Craig above n 14.

18 See comments of Sir Gerard Brennan in the "Opening Address—The AAT 20 years Forward" in J McMillan (ed), above n 5 at 17.

cases and cannot meaningfully contribute to policy development or agency best practice.

There is also an inherent structural tension in the role of independent administrative tribunals relative to the executive and the courts, which has implications for the normative goal of administrative review. Tribunals exhibit a certain confusion as to whether they see themselves in a quasi- judicial or administrative role. While they do not sit easily with the separation of powers doctrine, they are part of the executive branch of government.[19] The separation of powers doctrine provides for each branch of government to act as a check on the power of the other. Administrative law is concerned primarily with checks and balances on executive power. Government, in fulfilling its constitutional role, must act lawfully. The judiciary is a check on the lawfulness of the acts of the executive and the legislature and in this role it not only upholds individual rights in the instant case but ultimately may also have an impact on the political legitimacy of government.[20] Ambiguity arises because independent merits review tribunals act as a check on administrative decision-making and yet are part of the executive government.

To recognise and accept these tensions is not inevitably to abandon the normative goal.[21] Administrative tribunals have been proven to bring to their task the benefit of familiarity with the operation of the executive branch of government and, at the same time, the ability to decide matters fairly, justly and free of executive interference.[22] The *raison d'être* of review is independence from the administration while, at the same time, maintaining an understanding of, and connection to it. Difficulties arise where the normative goal pre-supposes consensus on the values and processes which constitute "good" government administration. In the absence of clear abuse of administrative power or "maladministration",[23] there will generally be a range of procedural and policy choices open to decision-makers. It is necessary to recognise these structural tensions and the complexities attendant upon them. With the recognition of these complexities a normative dialogue is likely to be more productive.

Administrative decision-making inevitably involves the exercise of discretionary power, whether it be in the complex value choices inherent in the task of statutory interpretation and the application of legal rules or in making choices about the application of government policy. It is only where meaningful discretion exists and there is the potential for it to be exercised differently between primary decision-makers and review bodies that the potential for change occurs. Reducing discretionary authority by confining discretion according to procedural standards, structuring

19 For example *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267.

20 This role has been most stark in the decisions of the High Court in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1.

21 Without constitutional reform the compatibility of independent merits review by tribunals and their connection to government administration will generate tensions. These tensions are conceded for the purposes of this discussion so as to move forward to highlight more practical issues and solutions.

22 For a discussion of these issues see J Disney, " The Way Ahead for Tribunals?" in R Creyke (ed), *Administrative Tribunals: Taking Stock* (1992) and Justice D O'Connor, "Effective Administrative Review: Analysis of Two-Tier Review" (1992) 1 *AJAL* 4. See also Administrative Review Council, above n 2.

23 Of the kind, for example, which would be within the jurisdiction of the Ombudsman.

discretion by recourse to rules and employing a system of checking administrative action is often perceived as the ideal model for the protection of individual rights and achieving justice in the individual case.[24] However it can be said of this approach that it endorses a

> legalistic concept of justice [which] plays down policy considerations and focuses attention on those demands typically made of administrators by subscribers to the legal paradigm—that is the typically legal view of the world which emphasises fairness, openness, predicability, etc. It minimises the importance in public policy-making of such factors as efficiency, adaptability, and the furtherance of public, rather than private interests; it takes too much for granted that 'justice' is an agreed, unproblematic, apolitical bench-mark. Not only may 'justice' mean different things to different individuals or groups but it is arguable that governmental processes should serve other values beyond those encompassed in such a term.[25]

From the time of the introduction of the "new" administrative law[26] in the 1970s the normative effect was conceived as an important factor in weighing the relative costs of providing a merits review system against the advantages which might flow from it. Increased cost was considered to be substantially offset "because the very existence of the system with its prospect of review in particular cases, should lead administrators in areas where the system operates to be the more careful to avoid error if they can".[27] There have however been a number of factors that have added to the complexity of achieving the normative goal and which challenge the appealing simplicity of the above proposition.

The role of government policy

The role of government policy in administrative review is a topic of wide import and analysis in administrative law.[28] It is central to the normative goal in that it concerns, among other things, the question of consistency of decision-making and the potential for review to contribute to broader improvements in the administration. It also remains one of the most contentious areas of administrative review. It is discussed in this paper only in relation to the historical conception of the normative goal and, later, in terms of how it may be identified as an issue for closer attention by review tribunals in their relationship to government agencies.

The role of government policy in administrative review is historically relevant to the normative goal for two reasons. Firstly the Kerr Committee was preoccupied with individual justice issues and did not promote the normative effect of its proposed administrative review system, envisaging instead that the power of an administrative

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24 K C Davis, *Discretionary Justice* (1969).

25 R Baldwin, *Rules and Government* (1995) at 160.

26 These reforms included the Administrative Appeals Tribunal Act 1975 (Cth), the Administrative Decisions (Judicial Review) Act 1977 (Cth), the Ombudsman Act 1976 (Cth) and later the Freedom of Information Act 1982 (Cth).

27 The Kerr Committee Report, above n 3 at para 374.

28 On the role of policy in administrative review see, for example, J M Sharpe, *The Administrative Appeals Tribunal and Policy Review* (1986); Justice M D Kirby, "Administrative Review: Beyond the Frontier Marked 'Policy—Lawyers Keep Out'" (1981) *F L Rev* 121; J McMillan, "Review of Government Policy by Administrative Tribunals" in R Creyke and J McMillan, *Commonwealth Tribunals: the Ambit of Review* (Law and Policy Papers, Paper No 9, Centre for International and Public Law, 1998); and P Bayne, "The Proposed Administrative Review Tribunal—A Silver Lining in the Dark Cloud?" (2000) 7 *AJAL* 18.

review tribunal would be restricted. It stated that the Tribunal should have no power to "substitute its decision when it is shown that the administrative decision is properly based on government policy".[29] The Committee recommended that the proposed Tribunal should inform the relevant minister where there was an oppressive or unjust result from the application of government policy in the individual case.

Secondly, and contrary to the Kerr view, the Administrative Appeals Tribunal Act 1975 (Cth)[30] does *not* in fact expressly bind the Administrative Appeals Tribunal (the AAT) to apply relevant government policy to the individual case on review, and so a body of judicial authority has developed as to the way in which policy is treated in administrative review.[31] In the leading decision of *Re Drake and the Minister for Immigration and Ethnic Affairs [No 2]*,[32] Brennan J put the position thus:

> When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to parliamentary scrutiny.

While *Drake* and subsequent cases[33] have addressed the role of administrative review tribunals in the application of government policy, there are many aspects of this issue which remain problematic, for example, the extent to which primary departmental decision-makers are caught between departmental directives to apply policy and other considerations.[34] Over time governments of all persuasions have been understandably not happy with tribunals having the option of departing from settled

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29 Kerr Committee Report, above n 3 at para 297.

30 And the legislation governing other Federal administrative review tribunals.

31 By comparison the Administrative Decisions Tribunal Act 1998 (NSW) now provides, in s 64 that "In determining an application for a review of a reviewable decision, the Tribunal must give effect to any relevant Government policy except to the extent that the policy is contrary to law."

32 (1979) 2 ALD 634 at 645.

33 See cases cited in J McMillan, above n 28 at 36-37.

34 In subsequent cases the courts have turned their attention to a consideration of the plethora of documents, including ministerial directives, departmental guidelines and manuals, memoranda and ad hoc directives, which may come within the definition of "policy". See *Ali v Minister for Immigration and Ethnic Affairs* (1994) 124 ALR 597 concerning the status of ministerial directions issued pursuant to Migration Act 1958 (Cth), s 499. It is often not simply a case of whether or not the policy has been applied. The policy may be applied, but with different weight put by the primary decision-maker and the Tribunal on certain aspects of the policy: *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158. Policy may be applied in part or the policy itself may be interpreted differently: *Re Chan and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 55. Where the policy has been developed after consultation with relevant stakeholders and purports to provide a multi-party approach to a complex "polycentric problem", the Tribunal may be less likely to depart from it: see discussion in M Allars, *Introduction to Australian Administrative Law* (1990) at 321 and C Harlow and R Rawlings, *Law and Administration* (2nd ed 1997) at 598-602.

government policy. Thus recognition by the administration of a role for review in improving policy or highlighting its unintended consequence has not occurred.

***Better Decisions*—report of the Administrative Review Council**

In 1993 the government commissioned the Administrative Review Council (the ARC) to inquire into the Federal tribunal system and as a result the *Better Decisions* report was released in 1995. It contained extensive comment and recommendations on the operation of the administrative review system. *Better Decisions* made a number of pertinent observations concerning the normative goal of review,[35] two of which are considered here. It noted the challenge of alternative dispute resolution practices to the normative goal and recommended the establishment of a new Federal review tribunal. The report again stressed the importance of consistency, clear reasoning and "quality"[36] in decision-making by review tribunals. It addressed the issue of the overall acceptance of administrative review within the "agency culture" and the need to encourage an administrative environment where "the objective of cost effective decision making is seen by some as being incompatible with the objective of improved quality of decisions and improved client focus".[37]

Better Decisions noted the increasing use of alternative dispute resolution (ADR) techniques in Federal administrative review tribunals, in particular in the AAT. The use of ADR has particular consequences for the normative goal of administrative review. The ARC endorsed the increasing use of ADR, albeit with some concerns expressed for the needs of unrepresented applicants and the level of skill required of mediators or conciliators. It was noted that the increasing use of ADR and other early settlement practices, such as the determination of matters "on the papers" without a hearing, resulted in confidential processes and sometimes the absence of a written decision. While there are obvious financial benefits in this approach, the ARC noted that

> it would be difficult to issue any guiding principles from a process in which the alternative views had not been fully argued and, where appropriate, tested... consistent with its comments about making decisions on the papers, the Council considers that if an applicant and an agency are in agreement about an outcome, then the objective of merits review in that particular case has been achieved. This necessarily involves acceptance of a possible loss of any wider normative effect from cases settled in this way. These important objectives have to rely on the (diminishing) proportion of cases that proceed to formal determination by the tribunals.[38]

Better Decisions recommended the establishment of the Administrative Review Tribunal[39] (ART), describing the challenge as being

> to design a system that retains all the positive attributes of the individual merits review tribunals but which also achieves greater perceived and actual independence,

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35 Administrative Review Council, above n 2 ch 6.

36 "Quality" in relation to decision making is obviously difficult to define. I refer here to minimum standards such as that decisions should cite the correct law, be expressed in clear and unambiguous language, refer to all the relevant evidence and set out the reasons for findings of fact and law upon which the decision is based.

37 Administrative Review Council, above n 2 at para 6.11.

38 Ibid at 53-54.

39 Ibid ch 8. The ART incorporates the Social Security Appeals Tribunal, the Immigration Review Tribunal, Refugee Review Tribunal and the Veterans Review Board.

improvements in agency decision making, and improved accessibility and economic efficiencies.[40]

The ART was promoted in *Better Decisions* as a body that would enhance the normative effect of tribunal decisions on administrative decision-making and processes across government. The provision of review within the ART was designed to address issues of inconsistency in decision-making by independent specialist tribunals and thus result in greater certainty for agencies and applicants. It was also argued that the constitution of specially formed panels would provide a better means of identifying and providing authoritative decisions on issues of general principle which would then be more likely to be accepted and applied by agencies in cases raising similar questions.[41] The proposed divisional structure and the allowance for these divisions to establish their own procedures was said to promote greater links between the divisions and the agency whose decision they would be reviewing. In particular it was proposed that there be a resourcing link whereby divisions of the ART would be funded through the budgets of the agencies whose decisions they are reviewing. Some argue that this will ensure a greater dialogue and understanding between the two of the nature of the specialised jurisdiction of each division.[42] However, linking tribunal funding to the agency whose decisions it reviews has the potential to reduce tribunal funding, to reduce the quality of decisions, to limit artificially investigative work and to threaten independence by forcing the tribunal to adopt practices in response to fiscal demands by the department. Such an arrangement positions the tribunal and the department as adversaries in the battle for ever-decreasing financial resources and further threatens the normative influence of review.

The *Better Decisions* report, responses to it and much anecdotal comment suggest that the responsiveness and adaptiveness in administrative culture that was envisaged by Kerr and Bland have not occurred. Agencies maintain that review tribunal decisions hold no precedent value, with each decision overturned effectively treated in isolation, thereby defeating even a limited normative role for review. In 1996 the government announced its intention to accept the thrust of the *Better Decisions* report although as yet, the extent to which the recommendations will be followed is not known. It is not clear, for example, how, if at all, the government proposes that the ART will address the tension between government and tribunals over the application of government policy.[43] The normative potential of review could be significantly diminished if the ART becomes bound to apply stated government policy. The Attorney-General endorsed the normative role of administrative review but expressed concern at its

40 Ibid at 142.

41 Ibid at 166.

42 An arrangement currently exists with the Immigration Review Tribunals, for example, which have operated in accordance with resource agreements negotiated with the Department and which has lasted for several years: Immigration Review Tribunal, *Annual Report 1997-98*. The Principal Member of the IRT/MRT, Suzanne Tongue, has publicly supported this arrangement as preferable to the linking of funding to the Department of Immigration and Multicultural Affairs.

43 The government's proposals, while still not fully evolved, appear to differ from the ARC model in several respects: R Leon, "Reform of Federal Merits Review Tribunals—The Government's Position" (paper presented to the AIAL Administrative Law Forum, 18 June 1998).

achievement. It is significant that, in the current environment of scepticism of the value of administrative review and the winding back of review rights, he stated that the

> next real challenge for all Commonwealth tribunals is to develop more effective relations not only with the individual applicant or client, but also with [their] 'long term' clients—that is, the departments and agencies with whom [the] tribunal has by necessity an ongoing relationship... failure to consider and develop the long term relationship between decision-maker and review tribunal will be to miss the opportunity for continuous improvement in administrative practices. This relationship is vitally important to the role and function of review tribunals.[44]

"The realities of bureaucratic governance"

In pursuit of the normative goal, attention must be given to the way in which administrative processes have been shaped in response to the range of demands on the administration. The issue is put succinctly by Mashaw:

> [A]dministrative procedural requirements embedded in law shape administrative decision making in accordance with our fundamental (but perhaps malleable) images of the legitimacy of state action...Whatever the complexity of normative preoccupations, therefore, administrative law scholarship seems to exhibit a certain naivete. In carrying forward its interpretive enterprise, it has tended to ignore behavioural questions about how its concepts are generated, structured and maintained. It has failed to ask hard questions about whether its ideological pretensions are in any way connected to the realities of bureaucratic governance.[45]

Had we looked at these "realities", we may have given more attention to the structural tensions impinging upon the normative goal, to the difficulties surrounding the role of administrative review and to questions of the independence and accountability of administrative tribunals. We may have considered more thoughtfully the relative public and private interests at stake in questions of government policy, the relationship of review tribunals with the administration and the changes in the public sector consequent on the growing influence of "managerialism". And, finally, there may have been more rigorous participation of administrative lawyers in the ongoing debate about the cost versus benefits of our administrative review system. These issues are now surfacing as ones of paramount importance.

The environment of administrative decision-making is not static. Apart from the changes brought by administrative law, there have been a number of other significant influences on public administration since the landmark administrative law reforms of the seventies.[46] The administration must also be responsive to changing economic, social and political demands. Increased competition for resources between government agencies, increased citizen demand for government services and the wavering political

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44 The Hon Daryl Williams, speech to the 1996 annual conference of the Administrative Review Council.

45 JL Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (1997) at 108. While Mashaw's analysis relates primarily to the United States context and draws from the United States legislative scheme and case examples, his theoretical discourse is also relevant to a consideration of administrative law in Australia. Note also that administrative law in the United States has been dominated by the use of generalised procedural statutes, eg, the Administrative Procedures Act rather than specific agency or policy specific statutes which have been the norm in Australia.

46 S Skehill, above n 5 at 1.

popularity of the notion of "small government"[47] and contracting out of government services have changed the nature of public administration. Added to these is the establishment of the Federal Court and its active role in appeals from administrative tribunals. These changes have signalled different, sometimes competing, values and priorities which have fought for prominence in an increasingly complex administrative environment.

The pace of reform in public administration has been accelerated by the state of the Australian economy, changes of government and the increasing constraint on government resources. In 1974 the Royal Commission on Australian Government Administration[48] uncovered extensive mismanagement across the public sector. This was followed by a review of the whole of the Commonwealth administration in 1982[49] and the setting of a reform agenda based on increased "efficiency and effectiveness". This report hastened the process of reform in the public sector, and successive initiatives were introduced including the devolution of government services, the introduction of user pays principles, risk management, increasing emphasis on constraint in public sector resources, the introduction of performance management, "managing for results" and the principle of "merit" in appointments to the public service. By 1986 a further review by the Commonwealth Department of Finance recommended reforms such as the contracting out[50] and commercialisation of government services, the introduction of corporate and strategic planning and the creation of the Senior Executive Service.

This package of reforms has become known as "managerialism" and is linked by a common theoretical base to public choice theory.[51] Central to both is the presumption that individual action is driven by self-interest. These influences have created an administrative environment more ideologically driven than at any time in the past. Public choice theory has had a number of practical implications for government administration and decision-making.[52] It advocates a minimalist role for the state with limits on discretionary power and the reduction of services provided by government. Competition, flexibility and experimentation are suggested as the panacea for expensive and highly bureaucratised administration of public services. Consistent with this has been the increasing delegation of policy making to the executive and the reliance on flexibility and efficiency in public administration. Judicial review is reinforced as the ultimate vehicle for administrative accountability while at the same time the appropriateness of judicial determination on these issues is questioned. The impact of this has not only been on the shrinking of the mainstream public sector but

47 D H Osborne and H Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (1992).

48 Commonwealth Parliament, *Report of the Royal Commission into Australian Government Administration* (chaired by Dr HC Coombs, 1976).

49 Commonwealth Parliament, *Report of the Review of Commonwealth Administration* (chaired by JB Reid, 1983).

50 A move which has since attracted much debate: see *Annual Report of the Commonwealth Ombudsman 1997* and Administrative Review Council, *Contracting Out of Government Services* (ARC 42, 1998).

51 I McClean, "Review Article; Recent Work on Public Choice" *British Journal of Political Science* 16 at 377-394; J L Mashaw, above n 45; M Pusey, *Economic Rationalism in Canberra: a Nation-Building State Changes its Mind* (1991).

52 D H Osborne and H Gaebler, above n 47.

on the rights and accountabilities which are integral to it.[53] This environment has had a significant impact on the day to day administration of government and the relative values attending competing administrative priorities.

However, public choice theory is criticised for its failure to provide a coherent explanation for administrative law and administrative processes. It fails to identify, in the complexity of the system, the source of control and the scope of that control over decision-making. The interaction between administrative decision-makers, statutory procedural rights, merits and judicial review contribute to this complexity. The managerialist focus on outcomes also tends to overlook the integrity and importance of the process. It denies the validity of the input of public interest groups with concerns other than economy and efficiency.[54] The influence of managerialism can lead decision-makers to lose sight of the legislative framework which governs their action. Administrative decision-makers will bring to their task their own value judgements and the cultural values of the organisation within which the decision is being made and these values will shape the particular policy or process choices which are made.

The managerialists' concern for economy and efficiency in government administration need not be viewed as contrary to the values of administrative law.[55] Demand for the efficient use of government resources can at the same time be seen more broadly as a legitimate objective of administrative review.[56] Administrative review bodies and the administration clearly both have an interest in an efficient and fair public administration. However, this commonality of goals may not be reflected in commonality of priorities in relation to process or policy choices, and herein lies a tension. The agency decision-maker is commonly balancing the relative concerns of the agency for efficiency, public interest and established government policy whereas review bodies have tended to a more traditionally judicial view to a consideration of the circumstances of the instant case.

LESSONS FROM THE MIGRATION JURISDICTION

The Migration Act 1958 (Cth) and the Migration Regulations made pursuant to it, set out the framework for the grant of visas to enter and remain in Australia, both permanently and temporarily. The Act provides for administrative review[57] of certain decisions, including the grant and cancellation of visas and the assessment of points scored under the General Points Test.[58] There are two specialist administrative review tribunals, the Migration Review Tribunal (the MRT), which largely has the jurisdiction

53 See discussion by M Allars in "Managerialism and Administrative Law" in J McMillan, H McKenna and J Nethercote (eds), *Fair and Open Decision Making* (1991) *AIAL Forum* 50 at 51.

54 G Tsokhas, "Managerialism, Politics and Legal Bureaucratic Rationality in Immigration Policy" (1996) 55 *AJ Pub Admin* 33 at 34.

55 It was, for example, not a primary concern expressed by the Kerr, Ellicott and Bland Committees, above n 3.

56 M Allars, above n 53 at 58-60.

57 See Migration Act 1958 (Cth), Part 5. Part 8 concerns judicial review of migration decisions which is not discussed at any length in this paper. The Migration Legislation Amendment (Judicial Review) Bill 1998 was before the final Federal Parliament of 1999 but was not passed. It aimed to restrict review further.

58 Migration Act 1958 (Cth), s 337(h).

of the previous Immigration Review Tribunal (the IRT), and the Refugee Review Tribunal (RRT). In addition, the AAT has jurisdiction in certain migration and citizenship matters. The RRT deals solely with applications for a visa based on recognition that the applicant is a refugee. The MRT conducts final merits review of decisions in relation to most other visa classes. It has an extremely broad, diverse and demanding jurisdiction. Much of the discussion below draws from the decisions of the IRT, as the MRT has not been in existence long enough for a fertile analysis. IRT decisions concerned the refusal to grant a permanent or temporary visa or the review of a decision to cancel a visa. Applicants for review may be onshore and at large, offshore, or in migration or criminal detention centres in Australia.

Review of migration decisions is a relatively recent addition to administrative review, with administrative and political resistance keeping migration decisions out of the ambit of review until the creation of the specialist migration tribunals in 1989.[59] The migration tribunals have often been at the forefront of publicly aired tensions between administrative tribunals and the administration. The current Minister[60] has been publicly critical of the performance of the migration tribunals and their alleged lack of understanding of broader public policy issues. He has criticised the tribunals for their failure to abide by government policy. Ministerial and departmental dissatisfaction with the "efficiency and effectiveness" of the system of merits review of migration decisions led to a review of the system in 1996 and the passage of the Migration Legislation Amendment Act 1998 No 1 (Cth). This abolished internal review of migration decisions by the Migration Internal Review Office (MIRO) and the IRT and created the new Migration Review Tribunal (MRT) which came into operation on 1 June 1999.

Relevantly, the migration tribunals are often criticised, among other things, for lacking exactly those benefits that should accompany specialisation, namely, they fail to produce consistency in decision-making, they intrude into government policy and they lack timeliness and efficiency in the review process. In this context, the experience of the review of migration decisions provides an interesting point for reflection on the achievement of the normative goal of review. Set out below are two examples, drawn from IRT reviews of decisions under the Migration Act 1958 (Cth), which particularly illustrate some of the tensions in achieving the normative goal of review. Migration decision-making is complex and there are obviously many public and private interests and values at play in any decision. Often change is subtle and occurs on a day-to-day basis either in dealing with citizens face to face, or in the context of corporate and strategic management decisions. Increased flexibility, openness and attitudinal change are obviously difficult, if not impossible, to measure. Yet there are inferences which can be drawn from the experience of the migration jurisdiction which are relevant to all areas of administrative review and may be useful in a re-appraisal of the normative goal. The case studies offer a window of empirical analysis on the operation of the review system.

59 Amendment to the Migration Act in 1989 created the IRT. Prior to this, review was conducted less formally by review panels with recommendatory powers only.

60 Minister for Immigration and Multicultural Affairs, Hon Phillip Ruddock.

The general points test

One way in which a person can seek to migrate to Australia is on the basis of his or her employability as assessed by way of the points system. A person with family in Australia would apply for what is known as a Skilled-Australian Linked visa. A person without a relevant family connection in Australia would apply for what is known as an Independent visa.[61] In these cases the applicant must meet a "qualifying score" under what is known as the "General Points Test".[62] The IRT (and now the MRT) have jurisdiction to review decisions in relation to the allocation of points under the General Points Test for migration.[63] An assessment under the points test requires the decision-maker to allocate points to the visa applicant[64] in accordance with criteria set out in the Migration Regulations under the headings of employment qualification, age, language skill, relationship to the applicant's sponsor, citizenship of the applicant's sponsor and the settlement status of the sponsor. By far the most contentious aspect of this assessment is the allocation of points for employment qualification.

In determining the allocation of points for employment qualification the decision-maker is required first to determine the applicant's "usual occupation"[65] and then to determine the "minimum entry requirements" for that occupation in Australia. Having done this, the applicant's personal qualifications and experience must then be assessed to determine whether they meet the Australian standards for that occupation. This final assessment must, in most instances, be made by a third party, namely the "relevant Australian authority"[66] who has expertise in the assessment of that particular occupation. Where that authority is unable to make a determination, the decision-maker has a discretion to stand in the shoes of the Minister and substitute his or her own assessment and allocate points for employment accordingly. The Department of Immigration and Multicultural Affairs has issued guidelines for the assessment of certain occupations which are contained in the Department's policy manual.[67] This is an area of decision-making which lends itself to the development of expertise by the exercise of administrative review. It is highly specialised and suited to an investigative style of decision-making where the nuances of culturally specific occupations and reliance upon skills developed outside of formal education can be thoroughly canvassed.

A reading of IRT decisions in relation to review of the assessment of points under the General Points Test reveals that the IRT has been consistently *in*consistent in its treatment of various aspects of this test.[68] For example the IRT in its decisions has:

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61 Migration Regulations 1994, Schedule 2, subclass 105 Skilled-Australian Linked.

62 Migration Act 1958 (Cth), ss 92-96, Migration Regulations 1994, r 2.26 and Schedule 6.

63 Migration Act 1958 (Cth), s 337(h).

64 The points that can be attracted by a spouse for the criteria of employment and age may be awarded to the primary applicant if they are more beneficial: Migration Regulations 1994, r 2.27.

65 "Usual occupation" is defined in the Migration Regulations 1994, r 2.26.

66 "Relevant Australian Authority" is defined ibid.

67 The Procedures Advice Manuals the most recent of which is PAM 3.

68 It is important to note that the Federal Court has also been ambiguous in its consideration of questions of law in relation to review of cases concerning the points test. See, for example, the Court's decisions on the term "usual occupation" and the use of references such as the Australian Standard Classification of Occupations (ASCO) in the cases of *Rahman v Minister for Immigration and Multicultural Affairs* (Federal Court, Davies J, 6

- adopted differing "minimum educational requirements" for the same occupation;[69]
- made contradictory findings on the circumstances in which the "relevant Australian authority" is unable to make a skills assessment;[70]
- proceeded in some cases to make its own, differing, occupational assessments in the face of expert evidence to the contrary;[71] and
- adopted different approaches to the steps to be followed in assessing whether an applicant meets the regulatory test.[72]

The Department has in large part ignored, or been highly critical of, decisions of the Tribunal in relation to employment assessment under the General Points test. Despite cases where the Tribunal has presented an alternative assessment, the Department's policy manuals do not reflect these decisions.

To place this situation in context, it must be said that the Tribunal has been operating in a regulatory framework characterised largely by confusion and by equally inconsistent direction from nominated third parties, such as the Comonwealth Medical Officer and the National Office of Overseas Skills Assessment whose decisions bind the Tribunal. While there is clearly an element of failure on the part of Tribunal members to act consistently in like cases, to simply label this inconsistency as the folly of individual members is to underestimate the challenge that the desire for consistency presents. In the assessment of applicants against the General Points Test there were further complexities. The departmental policy guidelines have themselves been found in some instances to be inconsistent with the requirements of the regulations in terms of their devolution of points assessment to third parties.[73] Further, 1997 saw the introduction of a standard Australian Qualifications Framework for educational qualifications. This framework included definitions of educational awards such as Certificates and Diplomas. However the Migration Regulations also define these awards and there is enormous difficulty in meshing the two definitions with the realities of individuals' varied qualifications and work experience. The role of the National Office of Overseas Skills Recognition (NOOSR) was also in a state of transition. At one point this office refused to assess the contribution of "work experience" in determining whether an applicant met minimum qualification

February 1997, unreported); *Minister for Immigration and Multicultural Affairs v Ye Hu* (1997) 149 ALR 318; *Yuk Shan Cheung v Minister for Immigration and Ethnic Affairs* (1997) 49 ALD 609; *Gounder v Minister for Immigration and Multicultural Affairs* (Federal Court, Mansfield J, 5 March 1998, unreported).

69 Note in particular Secretaries which range from no formal qualifications to a certificate to a degree: *Re Dutt* IRT Decision 13271; cf *Re Robertson* IRT Decision 13086; *Re Anthony* IRT Decision 10981.

70 For example, *Re Norcic-Korostil* IRT Decision 13415 where NOOSR was excluded on the ground that the occupation was not defined in ASCO; *Re Liang* IRT decision 12871 where no reason for exclusion of NOOSR as the relevant Australian authority was provided; *Re Fernandes* , IRT Decision 10716 where NOOSR was precluded in the assessment of secretaries in contrast to the decisions referred to in n 82 below.

71 *Re Ren* IRT Decision 12373.

72 Compare IRT decisions on Subclass 105 which refer matters to NOOSR as opposed to other external assessments or no assessments at all with decisions made by the Tribunal as to the "usual occupation" and minimum educational qualifications required.

73 *Avraham Bellaiche v Department of Immigration and Ethnic Affairs* (Federal Court, Sackville J, 7 May 1998, unreported).

requirements. While this is the prerogative of that agency, the Tribunal, in assessment under the Migration Regulations, was bound to take an assessment of work experience into account for the purpose of determining the allocation of points to an individual on the basis of their employment skills.

In May 1997 the government announced a review of the Independent and Skilled-Australian Linked visa categories to be conducted by the Department of Immigration and Multicultural Affairs. An interim report and recommendations were published on 28 August 1998.[74] Among the recommendations was the suggestion that in future all skills assessments be conducted by "relevant industry or professional organisations or by expert skills assessing bodies"[75] with no residual discretion residing in the Minister where the occupation or circumstances of the applicant are such that such a body may be unable to make an assessment.[76] The report also recommended that applicants be required to provide a skills assessment at the time of application.[77] There was a suggestion that this requirement would become a threshold issue that went to the *validity* of an application for the particular visa sought. If this is the result, merits review of skills assessments and the allocation of points under the General Points Test for employment qualification would effectively be precluded as the IRT had no power to review a decision that an application for a visa is not a valid application.[78]

In 1997-1998 the IRT conducted 388 reviews of decisions to refuse applications for a Skilled-Australian Linked visa, the majority of which concerned disputed allocation of points for skills assessment. This has provided important redress for many applicants who believe they have been wrongly assessed in the process of finding an Australian equivalent occupation and corresponding educational level for work which is often inextricably linked to the economic, social and political culture of their home country. To say that the proposal to restrict review in these cases is due solely to the inconsistency shown by the Tribunal is to overstate the importance of that issue. However there is no doubt that it has been a contributing factor. The apparent failure of the Tribunal to consolidate its experience in the assessment of these cases and to highlight the difficulties facing it and the Department, represents a missed opportunity in terms of the normative goal of review. While the Tribunal has on occasion drawn leading decisions on these issues to the attention of the Department and the Minister, there has not been any public response. At the same time, inconsistent Tribunal decisions have also no doubt resulted in unfairness to some applicants and in a lack of predictability for applicants for review. In some instances applicants sought to have reviews conducted in another State in the belief that they would obtain a more

74 Department of Immigration and Multicultural Affairs, *Review of the Points Test* (1998), Executive Summary and Recommendations. Media Release, Minister for Immigration and Multicultural Affairs (MPS 116/98) "Skilled Migration Changes To Boost Economy". The Report makes no mention of the function of administrative review in this assessment of the general points test. The IRT sent leading decisions to the review and offered to appear. The IRT has considered thousands of these cases over the years: see Immigration Review Tribunal, *Annual Report 1997-98* at 22.

75 Department of Immigration and Multicultural Affairs, *Review of the Points Test* (1998), recommendation 29.

76 This discretion is currently found in the definition of "relevant Australian authority" in the Migration Regulations, r 2.27.

77 Department of Immigration and Multicultural Affairs, above n 74, recommendation 30.

78 The same applies to the MRT: Migration Act 1958 (Cth), Part 5.

favourable IRT decision. In addition, the difficulties in application of the Regulations and third party assessments remain unresolved without the Tribunal making a contribution to their resolution.

Risk factor profiling

The IRT had jurisdiction to review a decision to refuse an application for a visa to visit Australia.[79] The MRT now effectively has this same jurisdiction. Visitor visas represent a significant part of the government's migration program as "decision-makers must balance their deliberations between the need for a quick response within the context of available resources and the need to protect Australia from the possible entry of non bona fide tourists".[80] Visitor visas thus represent an area of decision-making that is highly regulated and subject to government policy directives.

One of the issues of most contention in visitor visa cases is the assessment of applicants according to a number of specified risk factors, either in relation to previous applications for permanent residence or the applicant's matching with a risk factor profile. Risk factors were inserted into the Migration Regulations, effective from 28 June 1991, and have since applied to all visitor visa applications. The wording of the Regulations has significantly changed over time. In essence risk factors are characteristics of age, gender and nationality[81] which identify applicants as belonging to a group of people who have in the past had an overstay rate greater than five per cent by reference to these characteristics. Applicants falling within such groups are said to be affected by the risk factor and must satisfy a higher standard of proof in regard to the likelihood that they would overstay a visitor visa were it granted.

Prior to the introduction of risk factor profiling, overseas posts of the Department maintained their own local profiles of applicants considered to be at high risk of overstaying. The Tribunal was critical of aspects of the use of local profiles for assessment of an applicant's bona fides. Local profiles were inconsistent across the Department and idiosyncratic to the overseas post at which they were prepared. It could be argued that they stereotyped applicants. The Tribunal's attention to the application of local profiles and its criticism of their usefulness contributed to the development of a legislative base for risk profiling.[82] The amended legislation reflected the Tribunal's concern that

> although the new test continues to use the applicant's country of origin as a trigger for closer scrutiny, it clearly requires, as the IRT had insisted, that decision-makers must base

79 Migration Act 1958 (Cth), s 337. In assessing an application for a visitor visa the Tribunal is also required to have regard to Ministerial Policy directions. The Administrative Appeals Tribunal has jurisdiction in relation to a refusal to grant or the cancellation of a visitor visa on broad "not of good character grounds": Migration Act 1958 (Cth), ss 500, 501, 200 and 201.

80 Ministerial Policy Direction No 1 of 1996, Preamble

81 An additional "risk factor" is that the applicant has made an application to come to Australia as a permanent resident in the last five years.

82 *Re Neamo* IRT Decision 4091 August 1994; *Re Dounane* IRT Decision 5344 May 1995; *Re Saulog* IRT Decision 029 November 1990.

> their decisions on the circumstances of the individual applicant and not on generalisations.[83]

The introduction of risk factor profiling has itself not been without controversy. Cronin described the introduction of risk factor profiling as a "bold experiment" and noted that it was the first time, since the early days of Australia's discriminatory immigration controls, that specific national groups were identified for immigration control.[84]

The Tribunal has continued to comment critically on the application of risk factors. In *Re Van Xuong Vo*[85] the Tribunal questioned the basis of the Department's policy determination of "high risk groups" and refused to apply the risk factor. The Tribunal found that in effect no statistics relating to visitor overstay rates had been prepared by the Secretary in accordance with the requirements of the Regulations.[86] The Tribunal also noted in *Van Xuong Vo* that the Regulation was drafted in such a way that *all* applicants could be considered subject to the risk factor because the criteria purported to include "gender" and "nationality" which alone could bring an applicant within its scope. In *Re Begum*[87] the Tribunal criticised the "statistics" kept by the Secretary and noted that

> a class of persons shown statistically to have a "5% overstay rate" is patently not a class of persons who have overstayed. The classes of persons identified by the statistics are, in fact, made up primarily of people who have not overstayed—up to 95% of them have, by definition, departed Australia before the expiry of their visas.[88]

In 1996 the Parliamentary Joint Standing Committee on Migration conducted a review of Australia's visa system for visitors. In the course of this review the committee examined the IRT's consideration of visitor visas in the period from January 1994 to June 1995.[89] The Committee considered criticism of the high numbers of primary visitor visa decisions overturned by the IRT. This criticism was a reflection of the perspective brought to the debate by the Department and by external advocacy groups. The Immigration Advice and Rights Centre maintained that the high level of visitor visas granted by the Tribunal on review supported their claims of unfair and discriminatory practices in Departmental offshore posts. The Department was critical of the IRT and suggested that it simply ignored the application of risk factors and did

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83 P O'Neil, the former Principal Member of the IRT, Seminar Paper "The Immigration Review Tribunal" presented to the Third National Immigration and Population Outlook Conference, Adelaide 1995 at 3-4.

84 K Cronin, "A Culture of Control: An Overview of Immigration Policy Making" in J Jupp and M Kabala (eds), *The Politics of Australian Immigration* (1993).

85 IRT Decision 5904 September 1995.

86 Schedule 4, cl 4011(2)(b).

87 IRT Decision No 6218 30 November 1995 (also referred to in some instances as *Re Mehmood*).

88 The *Begum* decision was followed in a number of other Tribunal decisions. See *Re Qu Rong* 20 March 1996, *Re Kalaja* 22 March 1996, *Re Zhu* April 1996 and *Re Wang Sai Qin* 1996. It has also been referred to cautiously in a number of cases: *Re Estahbanati Zadeh* and *Re Aziz* March 1996. Other tribunals have not referred to the *Begum* decision and continue to apply the risk factor criteria. See *Re Pakfar* 1996 and others.

89 Commonwealth Parliament, Joint Standing Committee on Migration, *Australia's Visa System for Visitors* (1996) at para 7.61.

not have, or take into sufficient consideration, the benefit of local knowledge in its assessment.[90]

The Committee concluded that the relatively high IRT overturn rate was an

> indicator of the decision-maker's flexibility to grant a visa in risk factor cases when the applicant can demonstrate that there is a very little likelihood that he or she will overstay. It is relevant to note that there are a relatively small number of appeals against such visa refusals, even though all close family visa applicants who are refused visas are informed of their review rights. It is also important to remember that the IRT has particular advantages compared to the assessing officer overseas. The IRT is able to hear from the Australian family of the visitor visa applicant. This enables the IRT to have before it additional evidence concerning the reasons for the visit and the applicant's intentions or incentives for returning home.[91]

The Committee also supported the continued use of the risk factor criterion for the assessment of visitor visa applicants. However, it recommended that there be further assessment on the effectiveness of the risk factor profile in relation to overstay rates. The Committee concluded that the risk factor profile was a

> management device constructed from objective data which simply allows decision-makers to highlight those visitor applicants who must show appropriate evidence of their intention to return home. The risk factor profile does not mandate refusal of the visa.[92]

The report agreed that there were difficulties with the application of risk factors which had previously been highlighted by the IRT including (a) ambiguous drafting, (b) the potential to capture *all* applicants within the relevant groups and (c) the potential for discrimination in that, subsequent to 1 September 1994, it was not possible to provide an accurate representation of the total number of visitors who arrived in Australia and overstayed their visas.[93] The Committee recommended that the Regulations be amended to address these issues, which they were, with effect from 1 July 1997.[94]

Despite the amendment of the Regulations the use of risk factors as a feature of decision-making in relation to visitor visas has continued to be problematic. The Tribunal has, in a number of cases where the application was lodged prior to 1 July 1998, refused to apply the risk factor profiles as they were expressed under the Regulations prior to that time. The basis of that refusal was that the issue was a question of law concerning the interpretation of the relevant provisions. There have also been other issues such as that identified in the case of *Re Lazic*[95] where the

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90 Ibid at paras 7.56-7.81.

91 Ibid at paras 7.71 and 7.72. Note these comments were issued in the Ministerial Policy Direction No 1 of 1996.

92 Commonwealth Parliament, above n 89 at 182.

93 Ibid at 184.

94 It is significant that from 1 July 1997 the Migration Regulations were amended in two important ways. The Minister was required to specify in the *Gazette* the class of persons who had characteristics which placed them within the group identified as high risk and the statistics upon which these were based were specified to some degree. In addition, the Regulations now identified the factors as "any one or more" of nationality, age, marital status, sex, occupation or, in those cases affected because of a previous application, the "class of visa currently applied for": Migration Regulations, Schedule 4, cl 4011(3).

95 IRT Decision No 5647 1995. The risk factor profiles had not been updated to apply to the newly independent republics which previously made up Yugoslavia and remained expressed to apply to "Yugoslavia".

Tribunal was critical of the Department in its application of the risk factors to the citizens of the former Yugoslavia.

Analysis of decision-making in visitor visa applications was the subject of research by the Department in 1996, with the subsequent issue of a discussion paper.[96] This analysed the results of a departmental study of MIRO and IRT visitor visa decisions and provided useful comparative data on decision-making. Perhaps more interestingly it provided a rare insight into the way review decisions are viewed in the Department. The paper noted that the Tribunal continued to overturn a large number of primary visitor visa decisions and concluded, among other things, that

> some members of the IRT are reluctant to fully endorse a system such as risk factor profiles as they may see it as categorising applicants rather than treating them as individuals. It may also be due to a lack of information about numbers and implications relating to overstayers... These Members' views may have been exacerbated by the Department's failure to ensure that the relevant documentation is updated when changes in legislation occur.[97]

In 1998 the Department again reviewed and reported on visitor visa decisions by MIRO and the IRT. This report repeats concern at IRT decision-making based on "philosophical objections" to the application of the risk factor profile.[98]

Merits review of visitor visa decisions by the Tribunal has clearly contributed to the development of government policy and better decision-making practices in the consideration of applications for visitor visas. The abandonment of discriminatory local profiles by decision-makers at overseas posts of the Department, the introduction of risk factor profiling, the collection of relevant and fair statistics by the Department and the amendment of the Regulations to ensure proper application of those risk factor profiles have all reflected comment by the Tribunal as the result of merits review of individual cases. However, visitor visa decision-making also reflects the tensions between the Tribunal and the administration over the extent to which the Tribunal concerns itself with issues beyond the determination in the instant case and the Tribunal's approach to the application of government policy.

There have been few visitor visa appeals on risk factor issues considered by the Federal Court. The Department remains critical of the approach of the IRT. This criticism, first publicly aired at the Joint Standing Committee on Migration in 1996, has continued in the Department's reports of two studies of decision-making in visitor visa cases. The visitor visa program is significant to Australia's migration program and an area where decision-making is subject to pressures of time and volume. Rarely do primary decision-makers in visitor visa applications have the time to consider the issues involved in the way that the Tribunal does on review. It is precisely because of this opportunity for careful consideration that merits review has potential to make a substantial contribution to decision-making processes and outcomes in this area.

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96 Department of Immigration and Multi-cultural Affairs, Review Policy and Analysis Section, *Close Family Visitors, the Value of Profiling and the Immigration Review Tribunal—A Discussion Paper* (May 1996).

97 Ibid at 7.

98 Department of Immigration and Multicultural Affairs, *Report: Analysis of Visitor Visa Set Aside Decisions at the Immigration Review Tribunal (1 July 1996-30 June 1997)*, para 32.

WHAT COULD BE DONE?

It is obviously difficult to quantify the normative effect of administrative review. Many commentators have spoken of the enormous influence of the introduction of the AAT and clearly many citizens have obtained successful merits review of decisions from the AAT and other tribunals.[99] In their immediate response to the introduction of the new administrative law reforms in the 1970s, and to leading decisions of the AAT and the Federal Court, administrative agencies demonstrably changed some of their practices. The provision of reasons for decisions, introduction of internal review mechanisms, development of guidelines for decision-makers and training of officers in the requirements of procedural fairness were obvious responses to the requirements of the new system. While these changes are acknowledged, it is difficult to maintain a claim that administrative review continues to have a normative effect beyond the ongoing compliance with strict legislative procedural requirements which were placed upon agencies by these reforms. Debate about issues such as efficiency versus fairness, individual versus public interest and the ongoing claim that the cost of the system outweighs its benefits has continued. As Sir Anthony Mason said in 1995:

> Despite re-assuring statements that the [administrative] law system has brought about a significant change in the administrative culture and an improvement in the quality of administrative decision making, I am not altogether convinced that these statements are entirely accurate...[and] I doubt that we have succeeded in bringing into existence a new and enduring administrative culture.[100]

What is clear is that we can no longer feel confident, as the Kerr Committee did, that the existence of the system in itself will lead to improvement in agency decision-making and in improvements across the administration.

We can now draw on the more than twenty years of experience of our administrative review system. There will always be tensions attendant upon the place of administrative review in our system of government, just as there will be tensions *within* concepts such as "consistency" and "fairness" that are central to the purpose of review. Yet the system can work better than it does now and it is time for positive action to be taken towards the achievement of the normative goal. The following discussion isolates some of the significant issues and offers some suggestions to address them.

Tribunal identity

It is hardly contentious that tribunals generally have failed to develop a substantive dialogue with the agencies whose decisions they review.[101] This failure is often attributed to the need to maintain tribunal independence. There are, however, many issues which might be considered to impact more significantly upon independence, for example the tenure and quality of members. These issues were discussed at length in

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99 J McMillan, above n 5. For an overview of some of the key issues since the introduction of the AAT, see *AAT Annual Report 1997-98* at 105-118.

100 K Cole (ed), "Administrative Law; Form vs Substance" (1995) *AIAL* 9 at 9.

101 The AAT may be the notable exception in that it has initiated consultative groups within the largest of its jurisdictions. These consultative groups however tend to address practical process problems in the conduct of AAT reviews rather than the more substantive issues of policy and decision making which emanate from AAT decisions. See *AAT Annual Report 1997-1998*.

Better Decisions. There is no dispute that independent decision-making is the essence of review. However, in terms of the relationship between tribunals and the administration, it has tended to be treated as having a fragility which is not deserved or desirable. Tribunal members must of course be free of direction from the administration, implied or overt, in the determination of cases before them. Yet it is difficult to see how better communication between the administration and a tribunal on, for example, matters such as professional development relevant to decision-making, work flow, common trends and significant Federal Court decisions, is a threat to independence.

It is also the case that this reluctance on the part of tribunals to approach the administration has been largely due to the conception of their role. Despite the fact that administrative review tribunals are part of the executive branch of government in Australia, they have adopted a heavily "judicialised" approach to the conduct of review. While tribunals have largely adopted an alternative model to that of the courts—utilising informality, economy and quickness—decision-making has proceeded largely according to the judicial paradigm.[102] Emphasis is on distance (as distinct from independence) from the agency whose decision is under review; reliance upon the parties in presenting the evidence and determination by (usually) written reasoned judgments. Comment outside of the judgment in the instant case is regarded as inappropriate. However, an administrative decision-maker can contribute more. As Skehill noted in 1996,

> the AAT [and other tribunals] should be actively seeking to work with agencies whose decisions it reviews to help them to develop decision-making systems and training and to enhance policies and processes with a view to minimising the risk of further mistaken or inappropriate decisions... it is not sufficient for tribunals to say that they already fulfil this role through their statement of reasons for decision. Seldom do these adequately address the issues. Too frequently they are simply negative. What is needed is a far more positive and productive discourse between tribunal and agency.[103]

Privatised and non-adversarial decision-making

The increasing use by review tribunals of ADR and other "private" settlement procedures is a challenge to the normative goal of review. In the AAT in 1997-1998, for example, 77 per cent of cases in the General and Veterans Division and 86 per cent of Taxation Division matters were settled without a hearing or written reasons for decision.[104]

Clearly the ADR or early settlement approach has many advantages, including that it can result in a decision which has the endorsement of the applicant and the agency and which may be more likely to be a lasting settlement of the dispute. It is also a cost effective and less intimidating approach to dispute resolution for the applicant. However, privatising review in this way results in fewer written decisions and less opportunity for a tribunal to demonstrate good decision-making practices. With the

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102 M Allars "Administrative Law: Neutrality, the Judicial Paradigm and Tribunal Procedure" (1991) 13 *Syd LR* 327; C Harlow and R Rawlings, above n 34, ch 14.

103 S Skehill, above n 5 at 61.

104 AAT *Annual Report 1997-98* at 25. Some jurisdictions, such as migration, do not lend themselves to such an approach because of the nature of the decision to be made. An applicant cannot, for example, negotiate a different class of visa or a waiver of compulsory public interest testing in areas such as health and character.

increasing role of ADR, it is desirable for review tribunals at least to collect information about matters resolved in this way. More detailed information, for example, on the types of matters lending themselves to ADR, on the agencies most amenable to ADR and to the common themes or issues involved, would be useful feedback to the agency and the review body.

Departmental attitudes towards review have also been shaped by the conduct of matters in the review tribunals. An agency culture hostile to review will defeat the normative goal. The migration tribunals have been established according to an inquisitorial rather than an adversarial model. Features of this model include the capacity to make favourable review decisions on the papers without a hearing, the conduct of inquiries of the tribunal's own motion, and informal hearings in which the department is not represented.[105] While the inquisitorial model has many advantages, it at the same time precludes the department from an active role in the proceedings and can result in the perception by the department that the tribunal is not impartial. Such a perception further entrenches cultural resistance towards the provision of merits review. The department considers that its specialist expertise, particularly in the making of policy and the understanding of public interest issues specific to the jurisdiction, is disregarded. Departmental officers, operating in high volume jurisdictions with limited resources, view Tribunal members as naive or uninformed about the reality of the department's day-to-day business. There is a need to address this issue to ensure that the advantages of the inquisitorial approach are not lost, while at the same time, the effectiveness of review is not undermined.[106]

Public reporting

Tribunals often deal in high volume decision-making and there are many cases which turn solely on the facts of the case; other cases elucidate and develop significant principles of broader effect on administrative action. There is a need for a system that identifies those decisions of significance and draws them to the attention of the administration.

The proposed ART panels may go some way to address this issue and, if reporting requirements were given a legislative base, the problem may be resolved. *Better Decisions* stopped short of recommending that agencies should formally report on the impact of review tribunal decisions. The bulk of these decisions, it said, were not of sufficient significance, nor did they depart from the agency position. It did, however, recommend that agencies should be "encouraged to respond to a review tribunal decision that has potential implications for future agency decision making and where they consider the decision to be incorrect".[107]

Consistent with the recommendations in *Better Decisions* the President of the ART, or the heads of the existing tribunals, could be required to report cases which raise issues of normative significance to the Chief Executive of the agency concerned.[108] However, reciprocally, agencies could be required to provide a written Administrative

105 Administrative Review Council, above n 2 at 63.

106 The Australian Law Reform Commission is currently conducting a review of Federal civil procedure including the procedure of Federal merits review tribunals.

107 Administrative Review Council, above n 2 at para 6.41.

108 Tribunals might also report publicly in their Annual Reports on the impact of Federal Court decisions on Tribunal process. See also ibid.

Review Impact Statement annually in the same way as they are currently required to report on freedom of information, occupational health and safety and equal employment opportunity issues. The Administrative Review Impact Statement could identify those matters of significance to the agency and its response to them. Such a suggestion is not entirely new and many commentators have called for better public reporting of issues which arise in administrative review. The Committee for the Review of the System for Review of Migration Decision Making recommended, in 1992, that the Department of Immigration be required to issue a public statement if it decided to reject a review decision.[109]

Public reporting may involve agencies in questioning the agency culture in relation to review and has the potential to influence anti-review cultures within the administration. It must involve both the tribunals and the agencies whose decisions are under review. As Bayne suggests "Legislation cannot, by itself, legislate to instil appropriate value systems. But legislative and administrative structures can facilitate their realisation."[110]

Departing from policy

Review tribunals have poorly articulated difficulties in the application of government policy and any clear or cogent reasons for departing from it. Administrative review provides an opportunity for an in-depth consideration of the application of government policy to the real circumstances of individuals' lives, with all their unforeseen complexities. Such an opportunity is really a perfect testing ground for policy, and the information gained from this process is fruitful for further development and refinement of policy positions or for clarification of the policy position in legislative form. Tribunal members need to be trained and alerted to the issues that may arise in the application of policy and to their legal obligations in relation to it. This includes an appreciation of the breadth of policy documents, from departmental memoranda to ministerial directions.

While it is not uncommon for tribunals to note in their decisions that a policy issue should be drawn to the relevant minister's attention, there is no formal mechanism for issues of policy that are highlighted in an individual case to be put before the minister. In addition, there is no requirement for the agency to respond to, or publicly report on, cases that highlight clearly unjust and unintended consequences of policy application. This makes it difficult to determine whether policy development has in fact been influenced by review, unless the issue is one where there has been public debate, or the administration clearly states that it is responding to a tribunal decision. Formal reporting of decisions which concern significant policy issues would both contribute to a dialogue between the agency and the tribunals on this issue and improve future decision-making.

Evaluation

The success of the administrative review system largely concerns changes in agency culture and responsiveness which are difficult to identify and often impossible to quantify. It is relatively easy to collect data on, for example, the number of merits

109 *Report of the Committee for the Review of the System of Review of Migration Decision Making* (1992) at paras 7.7.1-7.7.5.

110 P Bayne, above n 28 at 30.

review applications from a particular agency, or the number of applications that result in the primary decision being set aside.[111] It is however altogether a different, and far more difficult, task to monitor the responsiveness of the agency to review decisions, both in terms of the treatment of like cases and the impact on agency practices, procedures and policies. It is also difficult, if not impossible, to measure the overall culture or climate in which administrative review is viewed within a particular agency.

However, without any systematic and long-term evaluation of the administrative review system, the achievements or failures of the system in pursuit of its normative goal fall to be gauged by anecdote, innuendo and the occasional public speeches of senior bureaucrats. As Justice Kirby said, reflecting on twenty years of the operation of the AAT,

> it is clearly important that, in the third decade of the AAT, a more concerted and coherent attempt should be made to measure the effectiveness of the tribunal, and not only in terms of financial cost. The time has come for the assumptions to be questioned and the consumers, as well as the recipients, of decisions to be heard. The ultimate justification of the AAT is only...that it contributes to good government of the people of Australia from whom all power in such matters ultimately flows. That includes the people affected by decisions. It also includes those involved in analogous disputes. It likewise includes taxpayers who foot the bill.[112]

CONCLUSIONS

As with many administrative law questions, the issues set out above might as easily have been considered in another framework, for example as inherent to the operation of discretion, or within notions of participation and accountability and participatory democracy. There are advantages however in analysing the review system in terms of its normative goal. Such an exercise lends itself to a search for practical solutions, such as the identification of means of communication and reporting between and within review bodies and government agencies.

There is no doubt that the introduction of the current system initially brought significant normative gains and that it would be diminished if stripped of its capacity to have a broad influence on the administration. However, there is a need to do more than simply re-state the normative goal. We need to reflect on the administrative review system and question its normative claims. This involves a questioning of whether, and how, traditional administrative law values underlying review—fairness, impartiality, rationality, openness—have influenced better government decision-making and decision-making processes.

A consideration of the normative goal of review focuses attention on the relationship between the review body and the agencies under review. The focus on this relationship must be maintained or else there is a risk of erosion of the entire review system in response to agencies manifesting their frustration by calls for restriction on review. The performance of review tribunals, and cultural resistance within the

111 See for example the Department of Immigration and Multicultural Affairs, *Annual Report 1997-98* and the section on MIRO and the IRT and RRT. See also reporting in the AAT and IRT *Annual Reports*.

112 Justice MD Kirby, "Administrative Review Twenty Years Forward" in J McMillan (ed), above n 5 at 377.

bureaucracy, are the primary impediments to the achievement of the normative goal of review.

We are at a point in Australia where the system of administrative review is facing an overhaul. It is a point not dissimilar to that of the introduction of the new administrative law package in the 1970s. It is timely to reconsider the reality of administrative decision-making in government today, the values and philosophies which are shaping the "reality of bureaucratic governance". The public sector has been through a period of enormous change, much of which has been driven by ideology which might be seen as anathema to review. However, this new bureaucratic culture and its values will have a determinative role in the achievement of the normative goal. Administrative lawyers and administrative decision-makers may have a vision of a just and fair administrative review system that is contradictory. These are tensions that our administrative review system has so far failed to address adequately. There have been a number of unheeded suggestions for change. To continue to ignore these tensions is to risk the isolation and marginalisation of administrative review by the increasing restriction of administrative discretion and the effective loss of review rights.[113]

The proposed establishment of the ART provides an opportunity for the ambitious normative claims of administrative law to be revisited. The administrative review system will have added little normative benefit to government administration, and at great cost, if it is found ultimately to be a system, devoid of precedential force, that provides only an individual case-by-case check on excess of administrative power.

113 See commentary on this issue by P Johnston, "Recent Developments Concerning Tribunals in Australia" in (1996) 24 *F L Rev* 323.